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THE LIMITATIONS OF THE POWER OF A STATE UNDER A RESERVED RIGHT TO AMEND OR REPEAL CHARTERS OF INCOR- PORATION.

INTRODUCTORY.

Says Mr. Justice Cooley in his "Constitutional Limitations" (7th ed., page 394, note 1): "Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases."

Minds less acute than that of Judge Cooley have not been as quick to perceive the possibility of such questions—subtle in their nature, profound in the legal problems which they involve, and of far-reaching importance in determining the relation of corporations to the state, and of the stockholders in corporations to one another and to third persons. There is probably no subject in the history of our constitutional jurisprudence which has been less satisfactorily discussed than this, both by text-book writers and by the courts of the land. Even the Supreme Court of the United States has either failed utterly to recognize the existence of the problem, or has glossed it over with observations of "glittering generality" that do not satisfy, with but little sustained

attempt to analyze the logical and historical principles involved, and with an arrival at conclusions that are apparently fallacious and, in their consequences, unjust.

In order properly to understand the questions involved and the principles upon which their solution depends, it is peculiarly necessary to recall the historical origin of the clauses in the constitutions and statutes of the states by which they reserve to themselves the right to annul, alter, or amend charters granted by them. It was, of course, the Dartmouth College Case¹ that first enunciated the doctrine that the charter of a corporation constitutes a contract between the state and the incorporators, and therefore that any material alteration of such charter by the state is a law impairing the obligation of a contract within the meaning of that phrase in Art. I, Sec. 10, of the Federal Constitution. I say that the doctrine was first promulgated in the Dartmouth College Case, although it might be more correct to state that the basic principle of that decision had been anticipated in two earlier cases,—viz., *Fletcher v. Peck*, 6 Cranch, 87 (1806), and *Terret v. Taylor*, 9 Cranch, 43 (1815),—in which it was held that a grant of lands by the state constitutes a contract between the state and the grantee, and that any legislative act in derogation of such grant is invalid as an impairment of the obligation of such contract.

It would be highly academic to point out, what seems to have been the since prevailing opinion of the profession, that the reasoning in the Dartmouth College Case did not justify the decision, which was alike illogical and inexpedient. There is but little doubt that, had the fourteenth amendment then formed a part of the Constitution, Chief-Justice Marshall would have sought protection for corporations under that amendment, rather than under the clause forbidding states to impair the obligation of contracts.² It

¹ *Dartmouth College v. Woodward*, 4 Wheaton, 518 (1819).

² In his concurring opinion in *Fletcher v. Peck*, *supra*, Mr. Justice Johnson refused to base his opinion on the impairment of obligation of contracts clause, and rested his decision that a state does not possess the power of revoking its own grants "on a general principle, on the reason and nature of things, a principle which will impose laws even on the Deity."

has proved easy for theorists to point out that there is no obligation remaining in an executed contract, and that individuals and the state owe no duty in respect to property granted by them other than that which they owe to all property of other persons; and that a gift completely executed is irrevocable, not because of the obligation of any contract, but because of the owner's general property rights as against the world.³ To say, as was said in *Fletcher v. Peck*, *supra*, that "a grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right," is no more correct in putting this undoubted legal obligation upon a contractual basis, than to say that there exists an implied contract that A shall not commit assault and battery upon B, or that A shall not steal B's property, and thus to reduce all rights of property and of immunity from torts to a contractual relation. It has also been generally accepted as true that, as argued by Attorney-General Wirt, it was the inviolability of private contracts, and of private rights acquired under them, and not grants of franchises by the state, which was intended to be protected by the Constitution. But however this may be, the Dartmouth College Case is imbedded too firmly in American jurisprudence to be questioned other than for purposes of intellectual amusement. "That an act of incorporation is a contract between the state and the stockholders is held for settled law by the Federal courts and by every court in the Union," says Mr. Justice Black in *Bank of Pennsylvania v. The Commonwealth*, 19 Pa. St. 151 (1852). "All the cases are saturated with this doctrine. It is sustained, not by a current, but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established."⁴ It is proposed in the course of this

³ See article by Judge Seymour D. Thompson, 26 Amer. L. Rev. 169 (1892).

⁴ Ohio is the only state which repudiated for a time the Dartmouth College doctrine: *DeBolt v. Ohio Life Insurance Co.*, 1 Ohio St. 563 (1853) (reversed in 16 How. 416); *Mechanics' and Traders' Bank v. DeBolt*, *ibid.* 591 (reversed in 18 How. 380); *Knoup v. Piqua Bank*, *ibid.* 603 (reversed in 16 How. 369); *Toledo Bank v. Bond*, *ibid.* 622

paper to point out a ground upon which, in the writer's opinion, the Dartmouth College decision should have been placed, and which (if, when examined, it shall be found impregnable) will afford the basis upon which it is intended to solve the problems under discussion in this paper.

It is said that the decision in the Dartmouth College Case caused much excitement throughout the country—an excitement which, after permeating bench and bar, spread among the community at large, and led to a growing uneasiness that corporations were to be the Frankensteins of their creators, and that the condition was one the only remedy for which could be secured by an amendment to the Federal Constitution. The courts were themselves keenly alive to the dangers of the situation, and the history of our jurisprudence from that time to this has been the record of the placing of limitations of more or less scholastic refinement upon the doctrine of the Dartmouth College Case, so that the effect of that decision is upon the history rather than the current or future development of our corporate institutions. Thus it has been held that the contract spoken of in the Dartmouth College Case does not arise until the charter has been *accepted* by the corporation, and that until such acceptance the legislature may alter, amend, or revoke the charter.⁵ It has also been held that, since the decision in the Dartmouth College Case proceeds on the theory of a consideration given by the incorporators in incorporating, there is, generally speaking, no consideration for privileges and exemptions granted by the state subsequently to the initial incorporation, and therefore such privileges and exemptions may be recalled or restricted.⁶ Licenses have been distinguished, with more or less questionable propriety, from grants of corporate franchises, and the right to revoke such licenses has been saved to the states

⁵ *State v. Dawson*, 16 Ind. 40 (1861); *Bank v. Richardson*, 1 Me. 79 (1820); *Regents v. Williams*, 9 Gill and J. (Md.) 365 (1838); *Pearsall v. Railroad Co.*, 161 U. S. 646 (1895).

⁶ *Christ Church v. Philadelphia*, 24 How. 300 (1860); *Philadelphia and Gray's Ferry Co.'s Appeal*, 102 Pa. St. 123 (1883); *Tucker v. Ferguson*, 22 Wall. 527 (1874); *Railroad Co. v. Supervisors*, 93 U. S. 595 (1876).

by judicial decision from the wreckage of their power under the Dartmouth College Case.⁷ So likewise the charters of municipal corporations have been declared to be grants or delegations of governmental powers for public purposes, and not contracts between the states and the municipalities which cannot be revoked or repealed.⁸ The doctrine of the inalienability of the right of eminent domain⁹ and of the police power¹⁰ brought back to the states a large and important part of their control over corporations, and the courts have justified such a vast amount of legislation as a proper exercise of the states' police power that the formula "*Salus populi suprema lex*" has been found an almost never-failing offset to the inconvenience of the Dartmouth College Case restrictions. But where it has failed, and where its limitations as defined by Mr. Justice Bradley in *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877)—viz., that it "extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals"—have become irksome, the courts have stepped wholly beyond the doctrine of the police power, and have invoked the broader, vaguer, and consequently more convenient principle that "the condition is implied in every grant of corporate existence that the corporation shall be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature may, from time to time, prescribe, which do not materially interfere with or ob-

⁷ *Calder v. Kurby*, 71 Mass. 597 (1856); *Stone v. Mississippi*, 101 U. S. 814 (1879). These cases are usually, but not always, explicable under the theory of an implied reservation of the police power.

⁸ *Crook v. People*, 106 Ill. 237 (1883); *Demarest v. Mayor of New York*, 74 N. Y. 161 (1878); *Philadelphia v. Fox*, 64 Pa. St. 169 (1870); *Covington v. Kentucky*, 173 U. S. 231 (1898).

⁹ *West Point Bridge Co. v. Dix*, 6 How. 507 (1848); *Hyde Park v. Oakwoods Cemetery Association*, 119 Ill. 141 (1886).

¹⁰ *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877); *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (1878); *Butchers' Union Slaughter-house Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746 (1883). The taxing power, unlike the right of eminent domain and the police power, may be alienated, and an exemption from taxation, given for a consideration, is irrevocable by the state, where there is no reservation of the right to alter or amend the charter. *New Jersey v. Wilson*, 7 Cranch, 164 (1812); *Pacific Railroad Co. v. Maguire*, 20 Wall. 36 (1873); *Northwestern University v. People*, 99 U. S. 309 (1878).

struct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created.”¹¹

But by far the most sweeping and comprehensive change in the status of this question has been wrought by those provisions which have been inserted in the general statutes or in the constitutions of most of the states, by which the power is reserved to the state to alter, amend, revoke, annul, or repeal all charters of incorporation subsequently granted by the state, whether the incorporation take place under special acts or under the provisions of general laws. These provisions for the most part antedated the promulgation of the police power and the other limiting doctrines above mentioned. The credit for their origin is usually given—expressly given in some of the decisions of the Supreme Court—to Mr. Justice Story, who is supposed to have been the first to suggest them, and with the view to furnish a method of evading the effect of the Dartmouth College Case decision. Judge Story says on page 675 of the report of the case in 4 Wheaton, in speaking of the law as it existed in England, that “when a private eleemosynary corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or implicitly reserved by the charter itself. *Unless*

¹¹ *Chicago Life Insurance Co. v. Needles*, 113 U. S. 574 (1884); *Hill v. Merchants' Mutual Insurance Co.*, 134 U. S. 515 (1889); *Louisville and Nashville Railroad Co. v. Kentucky*, 161 U. S. 677 (1895). In the last-named case the court, per Mr. Justice Brown, said: “While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests.” In addition to the examples given in the text of limitations on the Dartmouth College Case decision may be mentioned also the case of *Beers v. Arkansas*, 20 How. 527 (1857), in which it was held that the state cannot bargain away its right to exemption from being sued against its will, and the important “Granger Cases,” beginning with *Munn v. Illinois*, 94 U. S. 113 (1876). These cases, holding that the state has the right to regulate rates and tolls charged by corporations engaged in business of a public or quasi-public nature, are not to be classified as instances of the exercise of the police power. Thus it has been held that this reserved right may, by express language and clear intent, be irrevocably bartered away by the state, which is not true of any phase of the state's police power. See *Pingree v. Michigan Central Railroad Co.*, 118 Mich. 314 (1898), and cases there cited.

a power be reserved for this purpose, the Crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend its charter, or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter." And on page 712 he says: "In my judgment it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. *If the legislature mean to claim such an authority, it must be reserved in the grant.*"

Mr. Justice Story was not the first, however, to suggest the reservation in charters of a power to revoke or amend them. He himself cites the case of *Wales v. Stetson*, 2 Mass. 143 (1806), in which Chief-Justice Parsons said that "the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, *unless a power for that purpose be reserved to the legislature in the act of incorporation.*" Indeed, as early as September 15, 1784, the legislature of Pennsylvania passed an act incorporating a school at Germantown, which act provided that the constitution of the school should not be altered otherwise "than by an act of the legislature of this state," which clause was held, in *Commonwealth v. Bonsall*, 3 Wharton (Pa.), 559 (1838), to be the reservation of a power in the legislature to alter or repeal the charter. On January 15, 1802, Jefferson College was incorporated with a similar provision, which was construed in the same manner by the Supreme Court of the state in *Houston v. Jefferson College*, 63 Pa. St. 428 (1869). In 1809 Massachusetts, following the suggestion made in *Wales v. Stetson*, *supra*, reserved such a power in an act providing for the incorporation of manufacturing companies.¹²

¹² Paper by Andrew Allison before American Bar Association, 1884, vol. vii, page 241.

After the decision in the Dartmouth College Case the states, alarmed, as we have seen, by the fear that corporations were thereby placed beyond the pale of legislative control, were quick to avail themselves of the possibility of relief held out in a reservation of the right to repeal or amend the charters which they might grant. The Dartmouth College Case was decided in February, 1819, and as early as the following June the state of Rhode Island, in incorporating the Savings Bank of Newport, the Cumberland Literary Society, and the Seventh Day Baptist Church of Christ in Hopkinton, reserved in each of these charters the power to amend or repeal.¹³ Indeed, while the Dartmouth College decision was still being held under advisement, the state of Ohio, in re-incorporating the Cincinnati College, inserted in the charter such a reserved power.¹⁴ A similar provision is found in a New York charter in 1822,¹⁵ and in the general corporation act of that state of December, 1827 (1 R. S. 599), it was expressly provided that charters of all corporations thereafter granted by the legislature should be subject to alteration, suspension, and repeal in the discretion of the legislature, and this reserved power was sustained by the court in *McLaren v. Pennington*, 1 Paige's Ch. Rep. (N. Y.) 102 (1828), Chancellor Walworth pointing out that it was not a condition repugnant to the grant, but only a limitation of the grant. At first these reserved power clauses were embodied by the states sporadically in individual charters, afterwards they were adopted in acts providing for the incorporation of banks and railroad companies, but subject to modifying or neutralizing conditions, as public policy demanded costly works of internal improvement to be undertaken by private corporations; then they were attached to the general corporation laws of the state, and finally passed, in many instances, into the constitution, becoming thus a permanent and organic check upon the power of the legislature to grant irrevocable or unalterable

¹³ Rhode Island, Acts and Resolves, June, 1819, pages 28, 39, 43.

¹⁴ See *Ohio v. Neff*, 52 Ohio St. 375 (1895).

¹⁵ Address of Aldace F. Walker before Vermont Bar Association, 1885, page 12.

charters, until now there are but two states in the Union, Missouri and Florida, in which there seem to be no provisions of this kind either in the constitution or in the general statute law of the state. The provisions on this subject contained in the latest constitutions and revised statutes or codes of the various states are set out at length in the appendix.¹⁶

It is the purpose of this paper to consider the limitations of the power which a state reserves to itself when it thus retains the right to alter, amend, or repeal charters of incorporation granted by it subsequently to such reservation. As already stated, the questions involved in such an investigation have not been satisfactorily considered by the courts. We have from the judiciary for the most part merely general expressions—such, for example, as that in *Shields v. Ohio*, 95 U. S. 319 (1877), “Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration;” or that in *Holyoke Co. v. Lyman*, 15 Wall. 500 (1872), “Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corpora-

¹⁶ It is for most purposes immaterial whether the reservation be contained in the constitution or in a general statute of the state, for in either case it operates on all future charters, even though such charters are silent on the subject of such legislative right, and it becomes a part of the contract created by them, as much so as if expressed in the charter itself. The only difference is, that where the power to revoke or amend charters is provided for in a state constitution, no legislature can grant a charter free from such reserved power, whereas if the power be contained merely in a general statute, the legislature may in any subsequent statute or in any later special act of incorporation grant a charter which shall be irrevocable and thus *pro tanto* repeal the pre-existing statutory reservation of power. *New Jersey v. Yard*, 95 U. S. 104 (1877); *Scotland County v. Missouri, Iowa and Nebraska Railway Co.*, 65 Mo. 123 (1877); *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (1885). In some cases it becomes a very “nice” point as to whether an act of incorporation shows an intent on the part of the legislature to make the reserved-power clause of a former act inapplicable to that particular corporation or group of corporations. See, for example, *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636 (1898), especially the elaborate dissenting opinion of Mr. Justice Brown.

tion;" or that in *Stearns v. Minnesota*, 179 U. S. 223 (1900) (concurring opinion of Mr. Justice White), "It has . . . been . . . determined that the reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law;" or that in *Portland and Rochester R. R. Co. v. Inhabitants of Deering*, 78 Me. 61 (1885): "It is impossible to lay down any exact rule as to the lawful extent of the exercise of this reserved legislative power, and each case depends largely on its peculiar facts. But it is universally admitted that the power of alteration and amendment is not without limit. The alterations must be just and reasonable. The vested rights of property of corporations must be respected. The power should be confined to reasonable amendments regulating the mode of using and enjoying the franchise granted which do not defeat or essentially impair the object of the grant." There must be some principles which an analysis of the problem will disclose as the basis for arriving at more determinate results than that the exercise of the reserved power must be "just and reasonable," not "arbitrary," and not working "sheer oppression and wrong." In seeking to discover such principles we shall consider the subject under three headings, investigating the power which, under a reserved right to alter or repeal the charters of corporations, the state has to amend or annul such charters (1) so far as the charter represents a contract merely between the state and the corporation; (2) so far as the charter represents a contract among the stockholders or corporators themselves; and (3) so far as legislation with reference to the charter will affect or impair contracts previously entered into between the corporation and third persons.¹⁷

¹⁷ The subject need be considered with reference to the power of the state legislatures only. For in England there is no restriction on the power of Parliament to amend a charter. *Ware v. Grand Junction Waterworks Co.*, 2 Russ. and Mylne, 470 (1831); *Heathcote v. Railway Co.*, 2 Mac. and G. 100 (1850). And, so far as Congress is con-

I. THE CORPORATION AND THE STATE.

This phase of the subject should present but few difficulties. It is submitted that the two following propositions are true, and that their admission will determine the extent of the reserved power as between the state and the corporation:

1. The reserved power to alter, amend, or repeal a charter is a power reserved by the state as a private party to a contract, and not as a sovereign agency of government.
2. This power is a mere reservation of authority by the state, and not the creation of a new and distinct power.

Let us examine these propositions and the results that follow logically from their acceptance. The *ratio decidendi* of

cerned, it would seem that Congress is not prohibited by the Constitution from impairing the obligation of contracts at all. *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. Rep. 293 (1900); *Ansley v. Ainsworth*, 69 S. W. Rep. (Ind. Ter.) 884 (1902); *United States v. Church of Saints*, 5 Utah, 361 (1887). There are, it is true, dicta to the effect that Congress cannot impair the obligation of a contract, even in the absence of a specific constitutional inhibition; as, for example, the dissenting opinions of Justices Strong, Bradley, and Field in the Sinking Fund Cases, 99 U. S. 700 (1878), pages 736, 745, and 759 respectively. In *Loan Associations v. Topeka*, 20 Wall. 655 (1874), it is said that there are limitations on all branches of our government, arising out of the essential nature of all free governments. And Hamilton says in his Report to Congress in 1795 on the Public Credit: "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the two ideas of a promise which obliges with a power to make a law which can vary the effect of it." (Works, vol. iii, pages 518-519.) It is interesting on this point to note that when Art. I, Sec. 10, was under discussion in the Constitutional Convention Mr. Elbridge Gerry unavailingly endeavored to obtain the insertion in the Constitution of a similar restraint upon Congressional action. (Madison Papers, 5 Elliot's Debates, 546.) It is also interesting to note, however, that in all charters of incorporation granted by Congress the right to alter and repeal is expressly reserved, which would apparently assume the impotence to do so in the absence of such a reservation. For example, in the Philippine Islands Civil Government Bill now pending in Congress, § 74 provides that the government of the Philippine Islands may grant franchises, privileges, and concessions for the construction and operation of works of public utility and service, but that "no franchise, privilege, or concession shall be granted to any corporation except under the conditions that it shall be subject to amendment, alteration, or repeal by the Congress of the United States." Congressional Record, December 15, 1904, vol. xxxix, No. 9.

the Dartmouth College Case was that when a state grants franchises to a corporation a contract is created thereby between the state and its grantee. This contract is subject to the ordinary rules of legal agreements, including, as we have seen, the necessity of assent on the part of both parties, and the presence of a consideration moving from each party to the contract. It was argued on behalf of the state of New Hampshire that the state, in granting franchises to a corporation, acts as the sovereign dispenser of favors which, being a sovereign, it can recall at pleasure; that there is in no sense a contractual obligation lowering the state to the level of an ordinary contractor or bargainor; that since the state acts merely as a government dispensing privileges or franchises to a subject or group of subjects, the idea of contract is repugnant to the nature of the transaction. Mr. Holmes contended that the charter was merely a mode of exercising one of the great powers of civil government; that it was a law, and not a contract, and that its amendment was an ordinary act of public legislation. But this argument was sustained neither in *Fletcher v. Peck* nor in the Dartmouth College Case. The court, on the contrary, held that the state, in enfranchising a corporation, does not act in its sovereign capacity as a law-maker; does not act as it does in creating agencies for the exercise of public or quasi-public utilities; nor as it acts when it incorporates municipalities and delegates to them subordinate powers of government; but *pro hac vice* as a private individual or entity contracting with a group of individuals forming another entity. Therefore, once the state has granted lands, or incorporated a company, it has bound itself by all the obligations which would attach to a private individual who had made similar grants. And once the state has thus placed itself under the bonds of a contractual obligation, and *pro tanto* renounced the attributes of its sovereignty, it cannot thereafter re-assume its position of sovereign, and, as such, legislate so as to destroy or impair this contract which it had made in this private corporate capacity. Indeed, the fact that the state happens to have another and distinct legal status as a sovereign power must be regarded as a mere accident or coincidence. Such

a distinction becomes apparent by the analogy of a foreign king or potentate, who may be conceived as having an official sovereign status, and, distinct from this, an individual or personal status; and we might pursue the analogy by conceiving that such a sovereign could recall his acts done as a sovereign, but that he could not recall his personal acts or impair his private contracts any more than he could those of his private subjects.¹⁸ In the same way the state cannot take advantage of the fact that it is both a sovereignty and a private party to a contract; these two capacities must be carefully distinguished; and as a sovereign, that is to say, as a government, it has no more power, under the Federal Constitution, to impair a contract which it has made in its other, and what may be called its private, capacity, than it would have to impair such a contract between any two individuals. In short, we are dealing, not with a *law* of the state as a sovereignty, but with the *contract* of a state as the contractual obligation of an individual entity.

In considering, then, this contract between the state and the corporation as determined by the Dartmouth College decision, and in considering the exercise of the reserved power to alter or repeal the charter, it is essential that we lose sight altogether of the sovereign or governmental power of the state, and that we do not confuse such power with its power as a party to a specific contract. For if the state, in entering into a contract, acts in a private and not a sovereign capacity, upon what theory can it reserve to itself the right subsequently to annul or amend such contract? Upon the same theory, and the same theory only, that any one of two parties to a contract may do the identical thing. The state, as a contracting party, has no greater nor less powers in this respect than has any other party to a contract. If it enters into a contract as a private party, it cannot reserve to itself a power as a sovereign which power did not before belong to it as a sovereign. It merely can reserve to itself as a con-

¹⁸ The argument, of course, is for illustration only. It is not contended that there is in fact in kingdoms or empires any such theoretical limitation on the power of the sovereign over private contracts, such as is established by our Constitution.

tracting party the power to change the terms to which it has temporarily assented. It cannot descend from its throne of sovereignty in order to enter into a contract which will obligate the other party to the contract to subscribe to a new power which the state is to have as a sovereign upon re-ascending its throne of government.

We thus are brought to this question—that if a contract, say for the purchase and sale of goods, is entered into between A and B, two private individuals, and one of the terms of the contract reserves to A the power to alter or annul such contract, what power has A by virtue of such reservation? To which question there will at once suggest itself as an answer, the placing of two limitations upon such power—limitations which are as apparent as they are elementary:

1. The power refers only to the contract entered into between A and B, and not to other property, rights, or relations of B. A does not secure for himself by such reservation the power, for example, to murder B. A does not secure for himself the power to deprive B of his other property. A does not secure for himself the right to dictate contracts to be made between B and other persons, nor to impair pre-existing contracts between B and third persons which contracts have no relation to the subject-matter of the contract between A and B in which the power to alter or annul was reserved. A does not secure for himself any more dominion over or control of B's affairs in general than he had before such contract was entered into, or than he would have had in the absence of such contract. In short, the power is reserved to alter or annul only the contract in which such power is reserved.¹⁹

¹⁹ Thus in *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota Central Railroad Co.*, 14 Fed. Rep. 525 (1882), where a railroad company had submitted to construct its road through a city, under an ordinance reserving the right to alter and amend such ordinance, it was held that the company must submit to such alterations and amendments as were reasonable and necessary to carry into effect the original purposes of the ordinance; but that the reserved power clause gave no authority to amend or repeal the ordinance so as to affect the company's vested rights in property other than its franchises. In fact, it would seem that if by repealing the franchises such other vested

2. By virtue of a reserved power to alter or revoke a grant or contract, A cannot reserve to himself a power to do something with reference to B or to third persons, or even with reference merely to the specific contract in question, which it is forbidden him by law to do. A cannot, for example, reserve, or be understood as reserving, a power to charge B a usurious rate of interest in the transaction embodied in the contract. A cannot reserve, or be understood as reserving, to himself a power to steal from B the goods which B receives under the contract. In other words, A cannot, by a contract to which he is a party, undertake to secure for himself greater powers than the law allows to him; he cannot reserve the right to do things which are illegal, or which are in law as to him *ultra vires*.

Exactly the same considerations apply to a contract entered into by the state in which the state reserves to itself the right to repeal, alter, or amend the contract. If the grant of franchises constitute a contract between the state and the recipients of such franchises, and if the state reserve to itself the right to alter or revoke the charter,—that is, the contract between the state and the corporation,—the power thus retained is a power to alter or recall only that which the state has given in the charter, and only those rights which the corporation gets from the state. If the corporation does not get from the state its organization, that is to say, if the corporation is already fully organized when it applies to the state for a license to carry on its business as a corporate entity, the state cannot, by virtue of the reserved power, legislate with reference to the organization of the corporation.²⁰ If the corporation is the possessor of

property rights are impaired, such repeal cannot be justified. For example, it was held that the city could not prevent the company from completing a road which it already had in course of construction and which it had almost completed, after the expenditure of large sums of money. The merits of such a decision are questionable. Even if the repeal of the franchises were to diminish the value of the company's other property, this should not deprive the state of its repealing or amending rights, to which the company takes subject, and which it knows or should know can be exercised at any time.

²⁰ This argument will be developed at greater length in the second part of this paper.

property of its own, or subsequently becomes the possessor of such property, acquired otherwise than from the state, the state cannot, merely by virtue of a reserved power to alter or annul a contract entered into between it and the corporation, legislate so as to deprive the corporation of the property thus acquired by its own efforts, or so as to impair or regulate the use of such property.²¹ If the corporation has entered into contracts with third persons, the state cannot, because of its reserved power, legislate so as to affect or impair such contracts to which it is not a party, except in so far as the alteration of the terms of its contract with the corporation indirectly may affect such other contracts. In short, what the state has given the state may, under the reserved power clause, take away. The matters in reference to which the state has contracted may be altered by the state under its reserved power so to do. But this point is the *ne plus ultra* of the state's power under the reserved clause. It has no general power over the corporation. Nor can it, any more than can an individual, create for itself, under the guise of a reserved right, a forbidden power. The state cannot reserve for itself, nor can the reservation clause be construed as reserving to it, a power to do something which the Constitution of the state or of the United States says that it shall not do; nor to act in a manner in which the organic and fundamental state and Federal law demands that it shall not act. No state can disobey the fourteenth amendment; it cannot deprive persons or corporations of property without due process of law, nor can it deprive persons or corporations of the equal protection of the laws; therefore no reservation of a power to alter or revoke a charter or to amend any contract into which it enters can give it the power to do such things even with reference to the party or the corporation with which it is contracting. The reserved power is the reservation of an authority to change a particular contract; it is in no sense the creation of

²¹ Of course the state has such power to a certain extent under its police power, irrespective of any question of reserved power or of corporation law at all.

a new and distinct power, nor can it be utilized as the means or vehicle for accomplishing such a result.²²

Applying these principles to the concrete problem, the extent of the power of the state over corporations chartered by it, where it has reserved to itself the power to revoke or amend the charter, may easily be ascertained. The state gives life to the corporation—at least, to the extent of licensing it to do business as a corporation. Therefore this privilege—the franchise to exist as a corporation—may be recalled; the charter may be repealed.²³ The state also gives

²² "Certainly the legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the constitution itself concedes to it." Dissenting Opinion of Mr. Justice Bradley in the Sinking Fund Cases, 99 U. S. 700 (1878), page 748. "Reserving the power of amendment is merely not parting with it. The retention of power that can exist only within constitutional limits is not an expansion of those limits. The eighteenth section of the charter could have been written in this form: 'The legislative power of amendment vested by the constitution in the Senate and House is hereby retained by them, and is hereby extended beyond the constitutional province of legislation, and enlarged into a power of confiscation.' Such an extension clause cannot be implied. If it were implied, it would be no stronger than if it were expressed. If it were expressed, it would be void." Opinion of the Justices, 66 N. H. 629 (1891). In the Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300 (1872), it was held that a state could not tax the bonds of a corporation held by non-residents, owing to lack of jurisdiction. Could the state have created for itself any such power by means of a reserved power in that case? Can a power which does not exist be reserved?

²³ *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); *Erie and North-east R. R. Co. v. Casey*, 26 Pa. St. 287 (1856); *Lothrop v. Stedman*, 42 Conn. 583 (1875); *Griffin v. Kentucky Insurance Co.*, 3 Bush (Ky.) 592 (1868); *Thornton v. Marginal Freight Railway Co.*, 123 Mass. 32 (1877). Where the power to repeal the charter is limited upon a condition,—as, for example, that there has been a misuse or abuse of the privileges granted to the corporation,—the cases are in conflict as to whether or not the legislature can repeal the charter without an antecedent judicial finding of the happening of the condition upon which the power to repeal is limited. Thus in Michigan it is held that the courts must find that a violation of the charter has occurred before the legislature can act. *Flint and Fentonville Plank-Road Co. v. Woodhull*, 25 Mich. 99 (1872); *Tripp v. Pontiac and Lapeer Plank-Road Co.*, 66 Mich. 1 (1887). The opposite view is taken in Iowa, in Delaware, and in the United States Supreme Court, where it is held that the legislature in such cases is the sole arbiter as to whether the condition has happened upon which the power to repeal is contingent. *Miners' Bank of Dubuque v. The United States*, 1 Morris (Iowa), 482 (1846); *Delaware R. R. Co. v. Tharp*, 5 Harr. (Del.) 454 (1854); *Bridge Co. v. United States*, 105 U. S. 470 (1881). See also *Oakland R. R. Co. v. Oakland, Brooklyn and Fruit Vale R. R. Co.*, 45 Cal. 365 (1873). An intermediate position is taken in Pennsylvania and Minnesota, where

to the corporation other franchises, privileges, and exemptions; in so far as it does so it can revoke such grants, because they form parts of the contract existing between the state and the corporation, and the state has reserved to itself the power to annul or amend the whole or any part of such contract. Thus if the state has exempted the corporation from taxation by the state, such exemption may be repealed under the reserved power.²⁴ Not only the franchise to exist as a corporation, but also the other franchises of the corporation, may be resumed by the state—the franchises to carry on the particular business in which the corporation is engaged; for example, to run a railroad,²⁵ or a ferry,²⁶ or to lay pipes and mains in the public streets of a city and supply the inhabitants with gas,²⁷ or to transact a banking business,²⁸ or to collect tolls on a highway.²⁹ The power of eminent

it is held that the legislature can repeal the charter, and there is then a presumption that the condition had occurred and that the repeal was valid, but the fact is subject to judicial review, the burden of proof being on the corporation to prove that the repeal was unjustified. *Erie and Northeast R. R. Co. v. Casey*, 26 Pa. St. 287 (1856); *Commonwealth v. Pittsburg and Connellsville R. R. Co.*, 58 Pa. St. 26 (1868); *Mayor of Baltimore v. Connellsville and S. Penn. R. R. Co.*, 1 Abb. (U. S.) 9 (1865); *Myrick v. Brawley*, 33 Minn. 377 (1885). In Massachusetts it is held that the question as to the happening of the contingency is in the first instance for the legislature, but quære as to whether their decision, though *prima facie*, is conclusive. *Crease v. Babcock*, 40 Mass. 334 (1839).

²⁴ *R. R. Co. v. Georgia*, 98 U. S. 359 (1878); *Tomlinson v. Jessup*, 15 Wall. 454 (1872); *Iron City Bank v. City of Pittsburg*, 37 Pa. St. 340 (1860); *State v. Commissioner of Railroad Taxation*, 37 N. J. L. 228 (1874); *Deposit Bank of Owensboro v. Daviess County*, 102 Ky. 174 (1897).

²⁵ *Commonwealth v. Pittsburg and Connellsville R. R. Co.*, 58 Pa. St. 26 (1868); *Henderson v. Central Passenger Railway Co.*, 21 Fed. Rep. 358 (1884).

²⁶ *Town of East Hartford v. The Hartford Bridge Co.*, 10 How. (U. S.) 511 (1850).

²⁷ *Hamilton Gas-Light and Coke Co. v. Hamilton City*, 146 U. S. 258 (1892).

²⁸ *State of Ohio v. Granville Alexandrian Society*, 11 Ohio, 1 (1841).

²⁹ *Zimmerman v. Perkiomen and Reading Turnpike Road Co.*, 81½ Pa. St. 96 (1873); *Snell v. City of Chicago*, 133 Ill. 413 (1890). Contra: *Rochester and Charlotte Turnpike Road Co. v. Joel*, 41 App. Div. Rep. (N. Y.) 43 (1899). In that case a turnpike company was authorized to exact certain tolls; the right to alter, amend, or repeal the charter was reserved to the state. By a later act the legislature prohibited the company from charging a toll for bicycles, the effect of which amendment was to reduce the earning capacity of the company about twenty-five per cent. The court held that this act was uncon-

domain may be recalled.³⁰ The state by the act of incorporation gives to the stockholders a limitation of their personal liability; therefore this gift may be rescinded, and stockholders, as to future transactions of the corporation, may be made personally liable,³¹ or liable to a greater extent than they were before.³² And where the state has granted a franchise with the promise that it shall be exclusive, it may, nevertheless, recall or restrict this promise and limit the exclusiveness of the franchise granted.³³

Just as the legislature may recall *in toto* the franchises and privileges which the state has granted to the corporation, so it may recall them upon failure to comply with any condition which it may stipulate as the *sine qua non* of their continua-

stitutional, being a taking of the company's vested property rights, since such a franchise to take tolls was as much a vested right of property as the ownership of tangible property. It is difficult to understand this decision. The franchise to take tolls is in law a property right, but it was a right derived from the state and therefore could be taken away by the state, that being the very purpose of the reservation of the right to alter or repeal the charter. See discussion of similar cases *infra*.

³⁰ *Adirondack Railway Co. v. New York*, 176 U. S. 335 (1899).

³¹ *Anderson v. Commonwealth*, 18 Gratt. (Va.) 295 (1868); *Sherman v. Smith*, 1 Black (U. S.), 587 (1861); *McGowan v. McDonald*, 111 Cal. 57 (1896); *Bissell v. Heath*, 98 Mich. 472 (1894).

³² *Gulliver v. Roelle*, 100 Ill. 141 (1881); *Weidinger v. Spruance*, 101 Ill. 278 (1881); *Williams v. Nall*, 55 S. W. Rep. (Ky.) 706 (1900). So also the liability of the stockholders may be reduced. *Berwind-White Coal-Mining Co. v. Ewart*, 32 N. Y. Supp. 716 (1895). In *Gardner v. Hope Insurance Co.*, 9 R. I. 194 (1869), an act, passed under the reserved power to alter the charter, provided that whenever the capital stock of any insurance company should be diminished by losses, the stockholders might assess such further sum as was necessary to fill up the capital stock to its original amount upon the several stockholders in proportion to the amount of stock owned by each. Such an assessment was made and sustained by the court. The legislature, having admittedly the power to increase the liability of the stockholders, can delegate this power to a majority of the stockholders of the company, and give such majority the power to bind all the stockholders, although an attempt will be made later to show that the reserved power clause was intended to reserve to the state a power over the corporation, and not to enable it to vest such a power in a number of the stockholders of the company as against the other stockholders.

³³ *Perrin v. Oliver*, 1 Minn. 202 (1854); *West End and Atlanta Street R. R. Co. v. Atlanta Street R. R. Co.*, 49 Ga. 151 (1873); *Wilmington City Railway Co. v. Wilmington and Brandywine Springs Railway Co.*, 46 Atl. Rep. (Del.) 12 (1900); *Wilmington City Railway Co. v. People's Railway Co.*, 47 Atl. Rep. (Del.) 245 (1900).

tion. That is to say, it may impose burdens upon the corporation, submission to which is the price of the continued enjoyment of its franchises. Or it may attach restrictions to the exercise of any specific privilege given to the corporation by the state. Thus in *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352 (1886), a constitutional provision was upheld, requiring railroad companies, in thereafter exercising their right of eminent domain, to pay for injuries caused by the construction of the railroad, although before then the railroad companies had to pay merely for land actually taken and occupied by them.³⁴ In *Wilson v. Tesson*, 12 Ind. 285 (1859), an act of the legislature was sustained which provided that banking corporations could continue to do business only if they paid all their circulating notes in coin upon demand. In *Yates v. The People*, 207 Ill. 316 (1904), the court sanctioned an act providing that the charters of all insurance companies which ceased for the period of one year to transact the business for which they were organized should be deemed and held extinct in all respects as if they had expired by their own limitation. In *Railway Company v. Philadelphia*, 101 U. S. 528 (1879), it was stated that the legislature could raise the license fee for the running of cars by a street railway company. A similar principle was laid down in *Mayor of New York v. The Twenty-third Street Railway Co.*, 113 N. Y. 311 (1889), the court saying, per Mr. Justice Earl: "It (the legislature) may take away its (the company's) franchise to be a corporation, and may regulate the exercise of its corporate powers. As it has the power utterly to deprive the corporation of its franchises to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its

³⁴ The force of this decision is weakened by the fact that in a later opinion in the same case in 129 Pa. St. 181 (1889), and in the affirming opinion in *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75 (1889), the decision was placed on the ground that the charter of the railroad company was silent upon the point whether such consequential injuries must be paid for, and therefore there never was any contract between the state and the corporation that the latter should always be exempt from such liability. But the principle laid down in the original opinion is unquestioned authority.

burdens." In *Macon and Birmingham R. R. Co. v. Gibson*, 85 Ga. 1 (1890), the state of Georgia chartered a railroad company to run a railroad from Macon to the Alabama state line by whatever route the company might, at its pleasure, select. Subsequently, under the reserved power to amend or repeal the charter, the legislature passed an act providing that if the company ran its road within five miles of Thomas-ton, it must run into and through the corporate limits of that town. This act was sustained as a valid limiting condition attached to the franchise granted. Of course, the corporation need not accept these conditions, nor need it accept any amendments whatever to its charter. The state cannot compel it to remain in business under terms which it regards as too onerous to accept, and it always has the right to wind up its affairs and dissolve.³⁵ But if it wishes to continue its corporate existence it must submit to the conditions imposed upon such continued existence by the state.

These, then, are the limits within which the state properly may exercise its reserved power so far as its own relations with the corporation are concerned. It is contended, for reasons already set forth, that the state cannot regulate such property and rights of the corporation as are not given to the corporation by virtue of the act of incorporation itself. It cannot confiscate property and thus violate the fourteenth amendment. It has no greater control over the property of corporations than it has over the similar property of individual citizens. "If the state had given the stockholders the right of way and other real estate, and the money and chattels now belonging to them, and had reserved a right to revoke the gift, the question of retaking that property under the charter could be raised and discussed," say the Justices of the Supreme Court of New Hampshire in answer to a question of the legislature as to the latter's right to force the Concord R. R. Co. to sell its property to the state;

³⁵ *Yeaton v. Bank of Old Dominion*, 21 Gratt. (Va.) 593 (1872). This is upon the same principle that the state cannot force a man to become or remain a member of a corporation against his will. *Bagg's Case*, 1 Rolle Rep. 224 (1616); *Oliver v. Collins*, Brownlow and G. Rep. 100 (1609); *Rex v. Larwood, Comberbach*, 315 (1694); *Ellis v. Marshall*, 2 Mass. 269 (1807).

“ But the charter did not give them any of the state’s realty, money, or chattels, and an amendment or repeal of the charter cannot revoke a gift that has not been made.”³⁶ “ Whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights,” says the Supreme Court, per Mr. Justice Miller, in *Greenwood v. Freight Co.*, 105 U. S. 13 (1881); but “ personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power.” “ The reservation applies only to the contract of incorporation, to the corporate existence, franchises, and privileges granted by the state,” says Mr. Justice Field in his dissenting opinion in *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (1883). “ With respect to everything else, it gives no power that the state would not have had without it. Necessarily it cannot apply to that which the state never possessed or created, and therefore could not grant. It leaves the corporation, its business and property, exactly where they would have been had the Supreme Court held, in the Dartmouth College Case, that charters are not contracts within the constitutional prohibition against legislative impairment. It accomplished nothing more; and any doctrine going beyond this would be subversive of the security by which the property of corporations is held, and in the end would destroy the security of all private rights.”

In the Matter of the Petition of the New York Cable Railway Co., 40 Hun. (N. Y.) 1 (1886), in holding that the legislature might repeal the right of the petitioners to acquire the consent of the municipal authorities and property owners to the construction of its railway, the court, per

³⁶ Opinion of the Justices, 66 N. H. 629 (1891).

Judge Daniels, says: "While it is true that the legislature cannot deprive a corporation of any of its property, it may limit, restrict, or withdraw any of its franchises or corporate privileges by means of the power reserved to it by the constitution. . . . The distinction which has been taken on this subject warrants the conclusion that it is only where other rights of a proprietary character have been acquired and become vested that the interposition of the legislative authority for divesting or forfeiting them has been forbidden." In *Ohio v. Neff*, 52 Ohio St. 375 (1895), the legislature attempted to put the affairs of the Cincinnati College, a corporation subject to the reserved power, under the management of the directors of the University of Cincinnati, and to give to the latter control of the funds of the college. The court held the act void, as violating the provision in the state constitution that "private property shall ever be held inviolate." "Whatever difficulties," said that court, "have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it the legislature can strip a corporation of its rights of property." In *Woodward v. Central Vermont Railway Co.*, 180 Mass. 599 (1902), the defendant company was incorporated, subject to the reserved power, for the purpose of acquiring, for purposes of reorganization, the property of an insolvent corporation which had been foreclosed by a judicial sale. A subsequent statute provided that certain judgments recovered against the former corporation could be collected from the defendant company. It was held that such act was void, as being a mere confiscation of property. The court said, per Chief-Justice Holmes, "An unqualified power to amend authorizes a modification of the franchise conferred, but does not authorize a departure from the general restrictions on legislation with regard to property acquired and owned by the company, by the device of inserting a confiscation clause in the charter by way of amendment." In *Commissioners of the Sinking Fund v. Green and Barren River Navigation Co.*, 79 Ky. 73 (1880), the state of Kentucky leased to the defendant corporation a certain river line of navigation, with all rights and franchises

thereto pertaining. Afterwards the legislature sought to revoke the lease and to recall the right to collect tolls which appertained thereto. The court held that this could not be done. The lease had been made subsequently to the incorporation of the company, was a distinct right of property vested in the corporation by the state, was not a franchise of incorporation, and therefore was irrevocable.

An interesting case involving the same principle as that which runs through the above cases is *Stearns v. Minnesota*, 179 U. S. 223 (1900). In that case an act incorporating certain railroad companies provided that the companies were to pay three per cent. of their gross earnings in lieu of all taxes on their property. The power to alter or repeal the charters was reserved, and subsequently the state passed an act by which the companies were required, in addition to this original tax of three per cent., to pay on such of their lands not used for railroad purposes as were theretofore or might thereafter be granted to them by the state of Minnesota or the United States, the same taxes as were paid on similar lands by individuals. The decision of the court holding this act invalid is not strikingly clear, but the underlying thought suggesting the decision seems to be, and very properly, that although it might be admitted that the state could revoke any exemption from taxation previously granted, it could not use its reserved power to tax the railroad companies to a greater extent than property of a similar kind was taxed by the laws of the state—that is, to subject them to a kind of double taxation. The decision was based on the reasoning that “the privilege of amendment reserved was as to the rate and not as to the property to be included within the commutation,” and that “a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract.” It is difficult to understand just what the court means by this argument.³⁷ It is submitted that the true

³⁷ The following passages from the concurring opinion of Mr. Justice White are, to the writer, utterly unintelligible: “The amendatory act

basis for decision is to be found in the suggestion already made—viz., that the state can tax a corporation notwithstanding an exemption conferred in a charter which is subject to the reserved power, but that such right to tax extends only to a point where the corporation is taxed equally with others of its class, and that the state cannot, under the guise of a reserved power, increase the taxes *ad libitum* and to a point which means practically a confiscation of the property of the corporation, and consequently a violation of the fourteenth amendment. In other words, the state can tax the corporation only to the extent that it could have done had there been no exemption at all in the charter and no reservation of the right of amendment or repeal.

By far the best exposition of this entire subject is the opinion written by Mr. Justice Field in the so-called Railroad Tax Cases (*County of San Mateo v. Southern Pacific*

preserves the contract in favor of the state as an entirety, by retaining all the obligations due by the railroad to the state, and yet purports to repeal, alter, or amend the contract by relieving the state from its obligation to the corporation to include all the property of the latter for the purpose of taxation by a gross receipt tax, which was the consideration upon which the obligation of the corporation to pay such tax rested. . . . My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the state are concerned, and at the same time to destroy the reciprocal duty owed by the state to the other contracting party, is not to repeal, alter, or amend the contract at all, but, whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax was the duty on the part of the state to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. . . . Under these circumstances, to enforce the amendatory act would necessarily be to deny to the corporation the equal protection of the laws, since it would leave the corporation subject to taxation, not by the general laws of the state, but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract. It would be a denial of due process of law to the corporation, since it would be but the recognition of the right of the state, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the state as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation."

R. R. Co., 13 Fed. Rep. 722 (1882); *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Fed. Rep. 385 (1883). In this opinion that eminent jurist shows clearly that the reserved power enables the state merely to revoke or alter the rights given by it to the corporation, but that it does not give the state more power over other property of the corporation than it has over similar property of individuals, nor does it give the state power to violate the inhibitions of the Constitution of the United States. The state of California had taxed certain railroad companies in a way that the court in this case held was unfairly discriminating as compared with the taxation of the property of other corporations and individuals, and that therefore the act denied to these companies the equal protection of the laws and was invalid under the fourteenth amendment. It was argued by counsel that the state had the right to impose such taxes—in fact, to impose any taxes—upon corporations whose charters were subject to the reserved power of alteration, amendment, or repeal. On this point Mr. Justice Field said: “The state in the creation of corporations, or in amending their charters, . . . possesses no power to withdraw them when created, or by amendment, from the guaranties of the Federal Constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of their property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the state may exercise unlimited and irresponsible power. Whatever the state may do, even with the creations of its own will, it must do in subordination of the inhibitions of the Federal Constitution. . . . Whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be

subjected to burdens different from those laid upon the property of individuals under like circumstances. The state grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant the depots alongside of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise—that is, over that which is granted—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. . . . The reservation relates only to the contract of incorporation, which, without such reservation, would be irrevocable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation acquired in the exercise of its faculties is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business.”

It would be supposed, in the light of such an admirable treatise upon the subject, that the cases would uniformly conform to the doctrine which it advocates—the doctrine that maintains that under the reserved power the state can act as it pleases with the franchises of the corporation, but cannot do with the other property and rights of the corporation otherwise than it can do with the same kind of property and rights belonging to individuals or to corporations not subject to the reserved power. But it is probably not an exaggeration to say that the majority of cases reported in the books, both before and after the opinion just cited, are not to be reconciled satisfactorily with the principles there enunciated, and which are based alike on sound logic, justice, and

practicability. The cases are indeed well-nigh innumerable which hold that under the reserved power to alter, amend, or repeal the charter the state may exercise practically full dominion over all the affairs of the corporation. It is submitted that such cases are incorrect in the doctrine which they establish. It is admitted, as already stated, that if the state prescribes something to be done or something formerly done to be discontinued by the corporation as a condition precedent to the continued exercise of its franchises, such condition is a valid one, for the state, having the right to revoke the corporation's franchises and privileges, may suffer them to remain upon such conditions as it may see fit to impose and the corporation to accept in preference to dissolution or a loss of the franchise or privilege in question. The state may well say to a corporation: "We have the right, under our reserved power of revocation, to repeal the franchises which we have given to you. We are willing, however, to allow you to retain them, provided you comply with the terms which we demand, even though our condition be that you cede to us all your property and rights of every kind and description." If the corporation consent to such terms, however harsh or rigorous, it is merely purchasing from the state the forbearance on the part of the state from exercising its undoubted power. The purchase is a voluntary one, because the corporation may refuse the condition—it may refuse to surrender its property to the state and in preference thereto accept dissolution, retaining its rights of property for the benefit of its creditors and stockholders. It is for itself to say whether the price exacted by the state is too great a one. But where the state aims at a regulation of the property or rights of the corporation which are totally distinct from the exercise of the franchises and privileges which the state *can* control, and does not impose such regulations as a condition precedent to the corporation's continued exercise of such franchises,—as, for example, where a mere fine or other penalty is imposed by the state for the failure to impose such regulation,—a totally different question is presented, and the state, on the principles before argued, can have no authority from its reserved right to alter or

repeal the charter of incorporation, to regulate a right or property unconnected with the charter, franchises, and privileges which it has granted. Only the police power can justify such a regulation. Take, for example, as a typical instance, the legislation the validity of which came into question in *Mayor and Aldermen of Worcester v. Norwich and Worcester R. R. Co.*, 109 Mass. 103 (1871). The legislature passed an act requiring certain railroad companies to unite in the construction and maintenance of a union passenger station in the city of Worcester at a place to be determined by certain commissioners to be appointed for that purpose; also requiring these railroad companies to extend their tracks in that city to this new depot, and then to discontinue specified portions of their then existing locations. The cost to the companies was very great. If such legislation could be brought under the domain of the police power, as concerning the public health, safety, or morals, it would clearly be valid. But it is difficult so to classify it, even under the broadest interpretation of the extent of that power, and neither counsel nor the court argued, justified, or sustained it upon such grounds. It was upheld as a "reasonable exercise" of the reserved power to alter, amend, or repeal the charters of the railroad companies concerned. It is the writer's contention that the question as to the correctness of such a decision depends upon the application of the test already suggested. If the state in this act had provided that the corporations must either extend their lines or else the state would revoke their franchises, such a condition would have been perfectly valid;³⁸ indeed, the state might have given them the choice of extending their roads all the way to the state boundary or having their charter and charter rights repealed. But such was not the nature of the

³⁸ The lines could be *curtailed* by the state simply by a revocation of the franchise to run the railroad over that part of the route which the state wished the railroad company to discontinue. *Ames v. Lake Superior and Mississippi R. R. Co.*, 21 Minn. 241 (1875), contains a dictum, contra to the case in the text, that the state cannot compel the company to extend its tracks, but adds that the state could not do this even as an express alternative for the revocation of the franchises, which is manifestly incorrect.

legislation. The act simply prescribed a duty to be performed by the railroad companies; it was an arbitrary confiscation of their property by legislative fiat, and not connected with the charter contract the terms of which could be altered or annulled by the state. It was legislation with respect to rights and property not obtained from the state in the act of incorporation, and therefore not subject to the power reserved to alter or repeal such charter, unless demanded as an alternative for the revocation of the franchises, which was not the fact in the case.

Mayor and Aldermen of Worcester v. Norwich and Worcester R. R. Co. is but an example of many cases in which the states have, under the guise of the reserved power, legislated with respect to corporations in a way that deprives them arbitrarily of their property, denies to them the equal protection of the law, and, by imposing new and additional terms, conditions, and requirements, impairs the obligation of the contract existing between the state and the corporation under the principle of the Dartmouth College decision. Thus in *Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254 (1869), the legislature required the railroad company to erect a station at a specified point on its road. In *Sioux City Street Railway Co. v. Sioux City*, 138 U. S. 98 (1890), and in *Storrie v. Houston City Street Railway Co.*, 92 Tex. 129 (1898), the requirement was that a street railway company should pay for the paving of the street in which it operated for a certain distance outside of the rails, although the original act of incorporation had required the company, as the consideration for the grant of the franchises, to pave the street merely between the rails. In *English v. New Haven and Northampton Co.*, 32 Conn. 240 (1864), the railroad company was obliged to widen certain bridges built over its tracks in the city of New Haven.³⁹ In *Metropolitan R. R. Co. v. Highland Street Railway Co.*, 118

³⁹ In *People v. Lake Shore and Michigan Southern Railway Co.*, 52 Mich. 277 (1883), and in *Chicago and Grand Trunk Railway Co. v. Hough*, 61 Mich. 507 (1886), it is not clear whether or not the state had reserved the right to alter or repeal the charters of the railroad companies concerned. If there was such a reserved power, these cases are contra to *English v. New Haven and Northampton Co.*, *supra*.

Mass. 290 (1875), the act sustained was one which granted to a railway company the right to use the tracks of another company (whose charter was subject to a power reserved in the state to alter or repeal) upon making compensation to it for the use and wear of its tracks; and in *Union Pacific R. R. Co. v. Mason City and Fort Dodge R. R. Co.*, 128 Fed. Rep. 230 (1904), the Federal Court, in rather loose and general language, upheld a similar act imposing upon the Union Pacific R. R. Company the duty of giving permission to other railroad companies to use a certain bridge, station, and tracks belonging to it upon payment of reasonable compensation therefor. In *Massachusetts General Hospital v. State Mutual Life Assurance Co. of Worcester*, 70 Mass. 227 (1855), the charter of the defendant company provided that it should pay to the plaintiff one-third of its net profits. It being contended that there was no such thing as "net profits" in a mutual life insurance company, the legislature passed an act providing that the "net profits" to be paid by the defendant company should be taken to be the excess of the dividend over six per cent. annually payable by the company to the holders of the guaranty capital stock actually paid in. This act was sustained under the reserved power, although to all intents and purposes arbitrary—a mere voting away of the property of the defendant corporation. In the famous *Sinking-Fund Cases*, 99 U. S. 700 (1878), Congress, under the reserved power to add to, alter, amend, or repeal the act incorporating the Union Pacific R. R. Company, provided, by a subsequent act, that the company should set aside a certain portion of its current income as a sinking fund to meet the obligations of its subsidy bonds and other mortgage debts as they matured. The Supreme Court sustained this act as valid, making, in the course of its opinion, the remarkable assertion that "we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."

In addition to the above types of cases, there is likewise a series, objectionable for the same reason, in which the re-

served power of alteration or repeal has been held to justify legislation exacting from corporations the payment of additional damages for franchises previously granted. Thus in *Monongahela Navigation Co. v. Coon*, 6 Pa. St. 379 (1847), the Navigation Company erected a dam in the Monongahela River, being thereunto enfranchised by the state. It had been decided in a case in the Supreme Court of Pennsylvania in 1843⁴⁰ that the building of the dam by the company did not render it liable in damages to Coon, who owned a mill on a branch of the Monongahela, for injuries thereby sustained by him. Subsequently, in 1844, the legislature, acting under its power to amend the charter of the company, passed an act requiring it to pay damages for all injuries done by the building of its dam to land or property on the Monongahela or its branches by overflowing the same. The court held that this act was a valid exercise of the reserved power, and that Coon could recover under it—apparently a direct confiscation of the property of the company. In *Holyoke Co. v. Lyman*, 15 Wall. 500 (1872), a manufacturing company was chartered to build and maintain a dam across a river, paying damages for injuries suffered by the owners of fishing rights *above* the dam. The legislature subsequently passed an act requiring the corporation, at an expense of \$30,000, to construct a fishway in the dam so as to protect fishing rights *below* the dam. Without directly overruling *Commonwealth v. Essex Co.*, 79 Mass. 239 (1859), in which similar legislation had been held invalid, but manifestly disapproving of the decision there rendered, and feebly trying to distinguish it, the Supreme Court of the United States held the act constitutional under the power reserved to the state to alter or revoke the charter of the company, although it again was apparently equivalent to a deprivation of the property of the company by legislative enactment. And as a final illustration of this class of cases may be cited *McCandless v. Richmond and Danville R. R. Co.*, 38 S. C. 103 (1892), in which a statute made all railroad companies liable in dam-

⁴⁰ *Monongahela Navigation Co. v. Coon*, 6 W. and S. (Pa.) 101 (1843).

ages for property injured by fire from their locomotives, even though no negligence on the part of the companies was proved.⁴¹

The act of the state in each and every one of the above cases was an act which admittedly would not have been sustainable by the courts unless there had been in the charters or in the general laws controlling the charters a reserved power to alter, amend, or repeal them. Upon what theory did such reserved power justify this legislation? In every case it was taking from the corporation property and rights not given to it by the state, and therefore not subject to the reserved power. In none of the cases was the additional requirement or exaction made the price of the retention of the franchises. In none of them would the corporation, had it disobeyed the law in question, have forfeited its franchises as a result of its disobedience; money or property was all that it was to lose by its failure to obey the act; it was a forced deprivation of the company of its property, and in ways not connected with the franchises, rights, or privileges which the state had granted to the corporation. It is no answer to say that all such acts impliedly make their provisions conditions upon which the corporation is to be allowed to exercise its franchises; for provisions for the enforcement of the new exactions by other methods and remedies expressly negative the implication of a compulsory forfeiture of the franchises in case of disobedience. Moreover, to adopt such an argument would be to justify any legislation whatever with respect to corporations, even though it amounted to a complete confiscation of the corporation's property, in cases where the state had no intention whatever of imposing the new requirement as a condition alternative to the surrender of the company's franchises. And for these reasons it is contended that these and similar cases are incorrectly decided, and represent the exercise of

⁴¹ This case must be distinguished from *Jeffersonville R. R. Co. v. Gabbert*, 25 Ind. 431 (1865), in which a similar liability was imposed upon railroad companies, but only in case they failed securely to fence the line of their roads; the act therefore was justifiable as an exercise of the police power.

a power which the state cannot possibly exercise against a corporation under the Constitution of the United States as interpreted by the Dartmouth College decision, unless the requirement or exaction be placed in the original act of incorporation of the company, or unless the penalty for non-compliance be made the revocation in whole or in part of the franchises of the company granted to it by the state.⁴²

It must not be supposed that the decisions always are to be criticised as allowing to the state an unjustifiable control over the property, rights, and powers of the corporation, for sometimes the pendulum has swung in quite the opposite direction. Just as the states, in the instances given, have attempted to exert powers which it is submitted are not properly exercisable merely by virtue of the reserved power to amend or repeal the charter, so, on the other hand, there are cases of great importance in which it would seem that the courts have refused to allow to the states the exercise of a power which comes apparently directly within the scope and purpose of the reserved power. The reference is to cases concerning the power of the state to regulate the maximum charges and tolls of quasi-public corporations. It is well-known law that such a power exists even in the absence of a reservation of the right to alter or repeal the charter.⁴³ This power rests upon the theory that where

⁴² A large number of cases in which the decision is placed upon the reserved power of amendment or repeal would be subject to the same criticism as that suggested in the text, were it not for the fact that they are to be justified as exercises of the police power. Such, for example, are *New York and New England R. R. Co. v. Bristol*, 151 U. S. 556 (1893); *Suydam v. Moore*, 8 Barb. (N. Y.) 358 (1850); *Bulkley v. New York and New Haven R. R. Co.*, 27 Conn. 486 (1858); *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Me. 34 (1859); *Montclair v. New York and Greenwood Lake Railway Co.*, 45 N. J. Eq. 436 (1889); *Pearsall v. Great Northern R. R. Co.*, 161 U. S. 646 (1895); *Portland and Rochester R. R. Co. v. Inhabitants of Deering*, 78 Me. 61 (1885); *Chicago Life Insurance Co. v. Auditor of Public Accounts*, 101 Ill. 82 (1881). Others may be justified as an exercise of the taxing power; for example, *R. R. Co. v. Gibbs*, 27 S. C. 385 (1887). And still others under the principle already mentioned, that all corporations are impliedly subject to future general laws imposing reasonable regulations upon them; as illustrations may be suggested *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345 (1862); *Commonwealth of Pennsylvania v. Hock Age Beneficial Association of Philadelphia*, 10 Philada. Rep. (Pa.) 554 (1874); and *People v. Rose*, 207 Ill. 352 (1904).

⁴³ *Munn v. Illinois*, 94 U. S. 113 (1876).

the charter is silent upon the question, the corporation has not obtained from the state any grant of power to regulate its own rates to the exclusion in that respect of the state, which possesses such a power by virtue of the fact that the business carried on by the corporation is of a public nature, the power being akin to the police power. If, however, the charter expressly gives to the corporation the right to regulate its own charges, or provides any method by which such charges shall be fixed, the state has to that extent contracted away a privilege or exemption to the corporation, just as when it grants to it an exemption from taxation, and the one exemption is as irrevocable as the other.⁴⁴ In such cases, therefore, the state has lost its power to fix a maximum charge for the services of the corporation to the public, unless the charter was subject to a reserved power of amendment or repeal by the state. If such reserved power exists, then the state can recall from the corporation the privilege which it has granted to it of regulating its rates without the interference of the state, just as the state can, under the reserved power, recall from the corporation any other special privilege, immunity, or exemption which it has granted to it.⁴⁵ But although all the cases agree that the state can, under the reserved power of alteration or repeal, regulate the maximum of tolls charged by the corporation, even though that power be vested in the company by the charter, the cases go on to lay down the rule—upon what grounds it is difficult to see—that the regulation in every case must be a “reasonable” one, and in this respect it matters not whether the charter is or is not subject to the reserved power; in either case the state cannot reduce the maximum

⁴⁴ *Attorney-General v. R. R. Companies*, 35 Wisc. 425 (1874); *Illinois Central R. R. Co. v. Stone*, 20 Fed. Rep. 468 (1884). This is the prevailing view, although there is a decision contra in *Illinois Central R. R. Co. v. People of the State of Illinois*, 95 Ill. 313 (1880), based on the theory that such regulation of rates is an exercise of the police power, and therefore cannot be irrevocably bargained away.

⁴⁵ *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (1883); *Attorney-General v. R. R. Companies*, 35 Wisc. 425 (1874); *Stone v. Wisconsin*, 94 U. S. 181 (1876); *Beardsley v. New York, Lake Erie and Western R. R. Co.*, 15 N. Y. App. Div. 251 (1897); *Parker v. Metropolitan R. R. Co.*, 109 Mass. 506 (1872).

to a point which is judicially ascertained to be so unreasonable as virtually to deprive the corporation of the beneficial ownership of its property by taking away its proper earning capacity. The leading case sustaining this principle is *Lake Shore and Michigan Southern Railway Co. v. Smith*, 173 U. S. 684 (1898), in which an act of the state of Michigan fixed a maximum charge for the sale of the railroad company's mileage books. The court held that the rate fixed was "unreasonable," and the act consequently void, although the charter of the company was subject to the power reserved in the state to alter, amend, or annul it.⁴⁶ Is this decision not the result of a mere fear on the part of the court to apply an unquestionably logical principle to the solution of this problem? There is no doubt that the right of a railroad corporation to take tolls as a public carrier is a franchise granted by the state—as much so as the franchise to exist as a corporate entity, or the franchise to maintain and operate the road.⁴⁷ If it is a franchise granted by the state in the act of incorporation, then, as we have seen, the state can, under the reserved power to revoke or amend the charter, take away this franchise altogether. It can refuse to allow the railroad company to charge any fares whatever, the company having its option, upon such a deprivation of one of its franchises, of discontinuing its business and surrendering its charter. If the state can withdraw the franchise *in toto*, it can withdraw it partially

⁴⁶ So also *Southern Pacific R. R. Co. v. Board of R. R. Commissioners of California*, 78 Fed. Rep. 236 (1896). See also dicta to the same effect in *Stanislaus County v. San Joaquin and King's River Canal and Irrigation Co.*, 192 U. S. 201 (1903); *San Antonio Traction Co. v. Altgelt*, 81 S. W. Rep. (Texas) 106 (1904); and *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484 (1902). In *Ex Parte Koehler*, 23 Fed. Rep. 529 (1885), and *Railway Co. v. Gill*, 54 Ark. 101 (1891), there was the limitation on the state's reserved power that corporate and corporators' rights should not be impaired, and this restriction justified the decisions in those cases. The only case directly holding that the legislature, where there is a reserved power, can say what is a reasonable rate, and that its action in this respect is not subject to judicial review, is *American Coal Co. v. Consolidated Coal Co.*, 46 Md. 15 (1876), and it is doubtful, in the light of the tendencies on this subject, whether this decision would be followed to-day even in its own jurisdiction, although clearly logical, as explained in the text.

⁴⁷ *Blake v. Winona and St. Peter R. R. Co.*, 19 Minn. 418 (1873); *Morgan v. Louisiana*, 93 U. S. 217 (1876).

or upon conditions. It can say how much the company may charge. This is not like the numerous cases cited above in which it was contended that the acts imposing burdens and exactions of property upon the corporation were invalid, because this is the case of the state legislating directly with reference, not to other property and rights of the corporation, but to a franchise which it itself has given and which it has expressly reserved the right to recall or to alter at pleasure. How can there be any question in such a case of a "reasonable" regulation? How can the action of the legislature in fixing the maximum rate be subject to review by the courts? How can the corporation in such a case be said to be deprived of its property without due process of law? The company received the franchise only conditionally, and it is deprived only of that which it had contracted should be held at the will of the state and subject to regulation by the state. That the withdrawal of this franchise or the fixing of an "unreasonable" maximum charge may cripple the corporation or practically destroy its other property, is no argument against the exercise of the state's reserved power; for, as was well said in *Bondholders v. R. R. Commissioners*, Case No. 1625, 3 Fed. Cas. 846 (1874): "The repeal of its franchise would have well-nigh destroyed the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for use on the railroad would be gone." It is submitted that *Lake Shore and Michigan Southern Railway Co. v. Smith* is incorrectly decided, and that the cause of the decision there reached is an unwillingness on the part of the court, through a vague fear of possible consequences, to allow the state legislatures, under their reserved power, "unreasonably" to regulate the fares of railroad companies, although sound reasoning would seem to compel the admission that they have such power. It was fear of the state's exercising too great power over corporations that led to the Dartmouth College decision. It was fear of corporations securing too great power independently of state control that led to the clauses in state constitutions and statutes reserving to the state the right to alter, amend, or repeal charters thereafter granted by them.

If such clauses in turn threaten to restore the dangers which inspired the Dartmouth College Case, the remedy might properly be sought, it seems to the writer, not in an evasion of the logical application of the principle of the reserved power, but in a limitation of the reserved power of the state by provisions such as those found in some of the state constitutions and statutes, that the reserved power shall not be exercised so as to impair the vested rights of the corporation, to work injustice to corporators, or unreasonably to prevent the corporation from earning a proper compensation for the services which it renders and the capital which it has invested in its undertaking.

As a matter of fact, when it was stated in the argument in a previous part of this paper that the reserved power of the state cannot be exercised in a way prohibited by law,—in such a way, for example, that the corporation is deprived of its property without due process of law,—it must be carefully borne in mind that there cannot well be such a deprivation in the case of a repeal of the franchises of the corporation, or in exactions, however stringent, prescribed as conditions for the further retention by the corporation of the rights granted to it by the state. If the corporation has contracted with the state under terms which allow the state to recall what it has given to the corporation, it cannot be said to be deprived of its property without due process of law when the state retakes what it has thus given. It is not a question at all of “due process of law;” it is the act of a party to a contract exercising the right for which it has contracted. It has already been explained that the state cannot contract to have the power arbitrarily to take from the corporation property which was not given by it to the corporation; it cannot secure for itself in this way the right to deprive the corporation of its property without due process of law; it cannot bargain for itself a power forbidden to it by the Constitution. But with reference to the franchises which it has given, it can revoke the grant at its pleasure, or allow it to remain unrevoked upon whatever conditions it pleases; and even though those conditions take from the corporation all its property of whatever kind or description

or however attained, the taking cannot fairly be said to be a taking without due process of law, or to involve a question under the fourteenth amendment at all.

The admission of the truth of these principles, however, does not necessarily insure the proper decision upon the facts in every case, for other perplexing problems may frequently arise. One of the real difficulties that presents itself in the cases is to distinguish between what is properly a franchise of the corporation, and what is a property right distinct from such franchise. It is sometimes easy to confuse with franchises the *powers* of a corporation or other property rights, so that the courts, even while attempting to follow the principles ruling the question, have in some instances, it would seem, improperly applied them to the particular facts of the case. "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power—that is to say, a privilege or immunity of a public nature which cannot be legally exercised without legislative grant. Therefore the right to carry on any particular business, whether belonging to a natural or an artificial person, is not necessarily or even usually a franchise. The right to carry on such business by a corporation organized under a special charter or general law is not a franchise, but a power, provided such business might be conducted by any citizen who chose to engage in it."⁴⁸ The right to exist as a body corporate, carrying with it, as it does, powers of perpetual succession, the right to sue and be sued, and to transact business in a common name and with a limited liability on the part of stockholders, is undoubtedly a franchise.⁴⁹ So is the right to construct and operate a railroad,⁵⁰ especially in the streets of a city.⁵¹ The

⁴⁸ A. and E. Encycl., 2d. ed., vol. xiv, page 8. See on this subject in general, an article by R. Mason Lisle entitled "Foreclosure of Railway Mortgages," 20 Amer. L. Rev. 867 (1886).

⁴⁹ *Jersey City Gas-Light Co. v. United Gas Improvement Co.*, 46 Fed. Rep. 265 (1891); *California v. Central Pacific R. R. Co.*, 127 U. S. 40 (1887); *State v. Minnesota Thresher Manufacturing Co.*, 40 Minn. 225 (1889); *Tuckahoe Canal Co. v. Tuckahoe and James River R. R. Co.*, 11 Leigh (Va.), 78 (1840).

⁵⁰ *Blake v. Winona and St. Peter R. R. Co.*, 19 Minn. 418 (1873).

⁵¹ *Denver and Swansea R. R. Co. v. Denver City R. R. Co.*, 2 Colo. 682 (1875).

right to lay gas-pipes in the streets of a city is a franchise.⁵² The right to make and maintain a railway and to take tolls or fares thereon,⁵³ the right to collect tolls upon logs put into a river,⁵⁴ the right to collect tolls on bridges, roads, etc.,⁵⁵ the right to lay pipes in the public streets of a municipality and to collect rates for water furnished,⁵⁶ the right to carry on a banking business,⁵⁷ and especially to issue bank-notes,⁵⁸ the right to construct and maintain a pier and to take wharfage,⁵⁹ the right to build a mill upon a public river and to receive tolls for grinding,⁶⁰ have all been held to be franchises, that is, privileges granted by the state, although the grant may, of course, be to individuals as well as to corporations.

Notwithstanding these well-defined distinctions and principles, the courts in some of the cases have held to be property what more correctly would seem to be merely such franchises given to the corporation; in other cases the courts have held to be franchises what apparently are merely powers of the corporation. Let us consider two or three of the decisions which probably are in error in these respects. In *Detroit v. Detroit and Howell Plank-Road Co.*, 43 Mich. 140 (1880) (a decision handed down by the renowned jurist whose remarks on the reserved power are quoted as the opening words of this paper), the state of Michigan had incorporated a company to build and maintain a plank road from Detroit to Howell, the charter being subject to the usual form of reserved power. Subsequently the legislature passed an act providing that no plank-road company should

⁵² *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242 (1878); *State v. Cincinnati Gas-Light and Coke Co.*, 18 Ohio St. 262 (1868).

⁵³ *Blake v. Winona and St. Peter R. R. Co.*, 19 Minn. 418 (1873); *Morgan v. Louisiana*, 93 U. S. 217 (1876).

⁵⁴ *Sellers v. Union Lumbering Co.*, 39 Wisc. 527 (1876).

⁵⁵ *Truckee and Tahoe Turnpike Road Co. v. Campbell*, 44 Cal. 89 (1872); *Davis v. New York*, 14 N. Y. 523 (1856).

⁵⁶ *Spring Valley Water Works v. Schottler*, 62 Cal. 69 (1882).

⁵⁷ *Milbau v. Sharp*, 27 N. Y. 619 (1863); *State v. Stebbins*, 1 Stew. (Ala.) 312 (1828). But note special facts in latter case.

⁵⁸ *Augusta Bank v. Earle*, 13 Peters (U. S.) 595 (1839).

⁵⁹ *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 452 (1879).

⁶⁰ *Tuckahoe Canal Co. v. Tuckahoe and James River R. R. Co.*, 11 Leigh (Va.), 78 (1840).

be allowed to keep or maintain a toll-gate within the limits of any city without the consent of the municipal authorities, or to collect toll within such limits; if such toll-gate already existed, it must be removed by the company beyond the limits of the city within sixty days after notice to that effect given by the municipal authorities. The defendant company had its road already in operation; the City of Detroit gave it the notice prescribed in the act, and, upon the failure of the company to observe such notice, sought to mandamus it to remove such of its toll-gates as were within the city limits, the effect of which would have been to deprive it of the right to collect tolls upon two and a half miles of its road. Was anything sought here more than the withdrawal of a franchise—the franchise to take tolls from persons using the road of the company? That such withdrawal would have rendered practically valueless the other physical property of the corporation is not to be considered, for that is the result in every case in which such franchises are repealed; it is the risk which such corporations assume in building their road and buying property for the proper use and exploitation of their franchises; those franchises are revocable, and the corporation must “gather” its “roses” while it may. The court, however, in this case, denied the mandamus, saying: “There is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. . . . What the state claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.” It is submitted that the court is here misled by the ordinary identification of a fran-

chise and a property right of the corporation. It is true that the franchises are property rights of a corporation, but they are those property rights which the state itself has given to the corporation, and therefore subject to its reserved powers of revocation and amendment.⁶¹

The same confusion, resulting from the acceptance, for purposes of the solution of this question, of the ordinarily stated principle that its franchises constitute a property right of the corporation, is to be found in *People of the State of New York v. O'Brien*, 111 N. Y. 1 (1888).⁶² In that case the corporation of the Broadway Surface R. R. Co. in the City of New York was dissolved by the legislature acting under its reserved power. The question involved was whether the franchise to maintain tracks and run cars on Broadway and the mortgages which the company had given on these franchises survived the dissolution of the corporation. It was held that they did. "We think," said the court, "that there are no reported cases in which the judgment of the court has ever taken the *franchises or property* of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation." The right to run cars on Broadway, the court argued, was a "property" right derived from the City of New York, and this property right was independent of the life of the corporation; the legislature could terminate the life of the corporation, but could not confiscate its property. This argument fails to recognize that the very purpose of the reserved power is to recall at will the franchises of the corporation, and that the right to run a railroad through the streets of a city is a franchise,

⁶¹ See *Simpson County Court v. Arnold*, 7 Bush. (Ky.) 353 (1870), and *Snell v. City of Chicago*, 133 Ill. 413 (1890). The latter case, with the same facts as *Detroit v. Detroit and Howell Plank-Road Co.*, is contra. It proceeds, however, not so much on the power of the state under its reserved right of alteration and repeal, as on the doctrine of an implied condition in the act incorporating the plank-road company that the right to use the highway for a toll-road was to be lost as to such part thereof as might come under the control and government of an incorporated municipality.

⁶² Also in *Rochester and Charlotte Turnpike Road Co. v. Joel*, *supra*.

whether the right be given directly by the state or by a municipality, which is one of the governmental agencies of the state. And if the franchises can be and are revoked, any mortgage previously executed thereon must become *ipso facto* void, because the mortgagor cannot pledge a greater interest in the mortgaged property than he himself possesses therein, and the mortgagee knew or should have known that he was accepting a mortgage on a property interest which was revocable at any time at the will of a third party—viz., the state.

In 97 Me. 590 (1903), the Justices of the Supreme Court of Maine rendered an opinion to the legislature of that state which apparently errs on the other side of this same question—errs in calling that a franchise which is in reality a mere power of the corporation possessed by natural as well as by artificial persons without any grant by the state. The opinion was, in effect, that a law limiting incorporated insurance companies to the issuance of one standard fire insurance policy was valid under the power reserved in the state to repeal or alter the charters of such companies. Admitting that the state had no right, under this reserved power, to confiscate the property of the corporation lawfully acquired by it, or to impair the obligation of the contracts entered into between it and third persons, the judges nevertheless go on to say that “While the individual has existence and consequent rights independent of the legislature, the corporation or incorporated company derives its existence and rights solely from legislative action. The legislature may refuse to grant any corporate rights or powers whatever and even existence, or it may grant one only. Until the legislature acts, these do not and cannot exist. So the legislature may by general law or special act amend, alter, or repeal any corporate charter or corporate right or existence once granted (except, of course, where it has stipulated not to do so), and in so doing it may cut away the powers of a corporation one after another and from time to time, and finally destroy the last one and the corporation itself. . . . It can prohibit the acquisition of any more property by the corporation; it can prohibit the making of any new con-

tracts whatever by the corporation, or any new contract except one of a particular prescribed kind and form with prescribed stipulations therein. This power, sweeping as it is in its scope, is necessarily implied and included in the reserved power to amend, alter, or repeal the very legislative acts which gave life, powers, and rights to the corporation." But the point to be noted is that these "very legislative acts" did *not* give the powers and rights to the corporation which this opinion would seem to imply that they gave. They gave to the corporation life, it is true, and thereby the means or the power to acquire these others "powers" and "rights," but once the company is incorporated its powers and its property stand on the same basis as those of individuals. Its power to contract as a corporate entity is the same as the power of an individual to contract as an individual entity. The power to contract is *not* a franchise; it is not given by the state otherwise than in the sense that life, and therefore indirectly all other attributes and powers, are given by the state. It may be that the state under and by virtue of its police power has the power to limit insurance companies to the issuance of one particular form of policy. But then it has also power to place a similar limitation upon the power of an individual to act in the same way. It is here contended merely that the state cannot control the power to contract of a corporation which is subject to the reserved power, any more than it can control the power of an individual to contract; the extent of the power in either case depends upon other considerations, and is totally independent of, and derives no additional force or strength from, the reserved power. To say, as was said in the above opinion, that the reserved power gives to the state the right to limit the contracting power and other powers of such a corporation in any manner and to any extent to which the state may see fit, is to confuse the powers of a corporation with the franchises of a corporation, and to extend to the one the power which the state possesses only with regard to the other.

Summing up, then, the status of the relationship between the state and the corporation, so far as the extent and limi

tations of the reserved power are concerned, we have shown that in many instances the courts have allowed the legislature, under the guise of the reserved power, to exercise unlimited sway over all the rights, property, and affairs of the corporations subject to such power. It has been shown that these cases rest upon the mistaken assumption that the state, in retaining the right to alter or repeal a contract, can regulate or affect property and rights not concerned by nor provided for in the contract, and that it can reserve powers which are expressly denied to it by the Federal Constitution, that is to say, that it can create instead of merely retain existing powers. It has been pointed out that the rights and property of a corporation cannot be regulated by the state otherwise nor to a greater extent than similar property and rights of individuals can be regulated, except that the state can prescribe what it pleases concerning the rights and property of the corporation if it does so as the express condition upon which is to depend the retention of its franchises by the corporation. This latter power is enormous in its extent; it is too dangerous a power for any legislature to exercise; it is fundamentally opposed to all the limitations of power over property which Anglo-Saxon laws and traditions have imposed upon governmental bodies. When we consider that the state can at its pleasure destroy the corporate life, revoke the franchises of the corporation, or, as an alternative, allow the corporation to continue in its integrity at a cost of whatever sacrifice in rights, powers, or property it may choose to demand, we must realize that no legal nor constitutional restrictions at present operative upon the legislative power are sufficient to check this most dangerous authority—a power arbitrary and beyond the beneficent regulative power of the judiciary. Realizing the perils of such a condition, and frequently confronted in specific instances by unfair exercises of this power, the courts, as has been shown, have often refused to apply to the cases the principles logically controlling them; they have frequently denied to the legislature the right to revoke what unquestionably constituted the franchises of the corporation; they have refused to the legislature the right to regulate the tolls and

charges of quasi-public corporations beyond a "reasonable" point, although, being a franchise of the corporation, the right to take tolls should be subject, theoretically at least, to the unrestrained will of the legislature. It is submitted that the proper solution of the problem is to be found, not in illogical decisions, but, as has already been suggested, in such constitutional or statutory limitations upon the exercise of the reserved power as will prevent unjust action by the legislature, and will protect the property and interests of stockholders, bondholders, and mortgagees. The constitution of every state in the Union should contain a reservation of the right to revoke, amend, or repeal charters, but attached to such reservation should be the provision, not less fundamental, that this reserved power should never be exercised in such manner as in the opinion of the judiciary would be unreasonable—that is, in such manner as would work injustice to corporators or to third persons under the facts in any particular case. The beneficent results that would follow the general adoption of such provisions are foreshadowed in those comparatively few of the states which have already adopted them,—as shown in such a typical case, for example, as *Catawissa and Bloomsburg Electric Street Railway Co. v. Columbia and Montour Electric Railway Co.*, 12 Dist. Rep. (Pa.) 101 (1902), where an act of the state of Pennsylvania provided that any passenger railway company incorporated thereunder should have the right to use any streets, highways, and bridges included in the route of any existing passenger railway companies whose tracks were not laid down or in constant daily use. The plaintiff company in this case wished to enter, under the provisions of this act, a street for which the defendant company (whose charter was subject to the general reserved power) had secured the right of way. The defendant company had built five-sixths of its road, and to have deprived it of the part of its route claimed by the plaintiff company would have destroyed its circuit and rendered almost valueless much of the track already laid. Under the reserved power pure and simple the courts would, it is believed, have been obliged to sustain the act, and to have decided against the defendant company. But the de-

cision was in the latter's favor, because the power of amendment and repeal of charters reserved to the legislature in the constitution of Pennsylvania is subject to the proviso that it can be exercised only "in such manner . . . that no injustice shall be done to the corporators."

We shall consider in the second part of this paper the extent of the reserved power over corporations in so far as the corporate charter represents a contract among the corporators or stockholders themselves. This is a subject of far greater intricacy than the one thus far considered; and from the maze of conflicting and irreconcilable decisions in the reports, we may well deduce the conclusion that the courts have evolved from it no consistent application of principles, even in those few cases where principles have been recognized as governing the subject at all.

Horace Stern.

(To be continued.)